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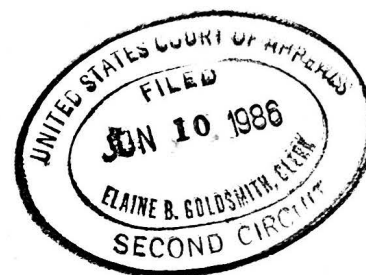
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June 10, 1986

HAND DELIVERY

Elaine B. Goldsmith
Clerk of the Court
United States Court of Appeals
for the Second Circuit
Room 1705
United States Courthouse
Foley Square
New York, New York 10007



Re: Universal City Studios, Inc. v. Nintendo Co., Ltd., Docket Nos. 86-7077, 7099, Calendar Nos. 1221, 1335 (to be argued June 16, 1986)

Dear Ms. Goldsmith:

Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, I am writing on behalf of appellant-cross appellee Universal City Studios, Inc. ("Universal"), to call the Court's attention to the recent decision in Silverman v. CBS, Inc., 84 Civ. 1894 (S.D.N.Y. April 14, 1986) (GLG), which was synopsisized in the New York Law Journal last Friday (issue of June 6, 1986, p. 2, col. 4). A copy of the Silverman slip opinion is Attachment A hereto.

The Silverman court's discussion of CBS's trademark rights in "Amos 'n' Andy" (at pp. 19-23) is germane to several issues on Universal's appeal. The Silverman court held that CBS had "protectable marks" in "the name 'Amos 'n' Andy' as

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well as the characters' names and appearances, and other distinctive features of the Amos 'n' Andy radio and television shows." Slip op., p. 21. It recognized CBS's right to seek Lanham Act relief although CBS concededly "ha[d] not used the trademarks associated with Amos 'n' Andy for twenty years" (p. 23). Silverman thus underscores that Lanham Act litigation against unauthorized use of a mark is not improper merely because the trademark proprietor does not have a lot of current licenses outstanding -- or, as in Silverman itself, any such licenses. Silverman supports Universal's showing that there is no merit to Nintendo's claim that Universal's Lanham Act suit was improper because of the status of Universal's King Kong licensing efforts, or the alleged decision of Ms. Sifuentes to stop licensing King Kong, or Universal's failure to "disclose" her supposed decision to its litigation counsel. See Universal's Opening Brief, pp. 11-14, 43-44, and its Reply Brief, pp. 16-17.*

Silverman also supports Universal's showing that its litigation of its King Kong rights was in no sense "exceptional", nor its complaint "overbroad." See Universal's Opening Brief, pp. 42-43, 48-49, and its Reply Brief, pp. 15 n.*, 20-21. CBS was claiming a trademark infringement for any work "based on the Amos 'n' Andy characters," even if the infringing work did not use the name "Amos 'n' Andy" (p. 4, fn. 17 to p. 23), just as Universal did vis-a-vis "Donkey Kong"; CBS had not "created" Amos 'n' Andy, but was suing by assignment, just as Universal did; and CBS asserted broad trademark rights even though a substantial portion of the

*Silverman correctly notes that non-use may be evidence of an intent not to resume use, and therefore of abandonment; but it treats this issue as separate and distinct from the existence of a protectable mark. Moreover, recognizing that "abandonment results in forfeiture of property rights, [and therefore] 'should be strictly proved,'" citing Saratoga Vichy Spring Co. v. Lehman, 625 F.2d 1037, 1044 (2d Cir. 1980), the Silverman court "reserve[d] for trial the issue of abandonment" (slip. op., p. 23) -- notwithstanding that the Amos 'n' Andy marks had not been licensed for 20 years. Compare the present case where Ms. Sifuentes' alleged "decision" occurred (if at all) only some three months before Universal asserted trademark rights against Nintendo, and Universal in fact had current licenses outstanding.

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copyright in Amos 'n' Andy had concededly fallen into the public domain (pp. 7-8). Silverman rejected a motion for Rule 11 fees against CBS. Silverman thus supports Universal's showing that there was no basis for the District Court's award of attorney's fees against it, either under the Lanham Act -- which allows a fee award only in an "exceptional" case -- or on any other basis. See Universal's Opening Brief, Point III.B, and its Reply Brief, Point IV.B.

We appreciate your courtesy in bringing this supplemental authority to the Court's attention. Copies of this letter are enclosed for the panel's use.

Respectfully yours,



Michael W. Schwartz

MWS:dlm

Enclosures

cc: John J. Kirby, Jr., Esq.

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